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No. 90-1951 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RANDY HASKETT, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was proper for a trial court to conduct a brief *voir dire* of a juror who was accused of misconduct during the deliberation phase of a capital trial.

2. Whether instructions that mental disturbance and extenuating circumstances may be considered as factors in mitigation in the penalty phase of a capital trial adequately advise the jury that evidence of insanity is relevant to the determination of appropriate punishment.

3. Whether a claim of prosecutorial misconduct, to which petitioner did not object at trial, presents a substantial federal question.

4. Whether an admission by petitioner, elicited from him by his defense psychiatrist and admitted without objection at the first trial, can be reintroduced at the second trial.

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OPINIONS BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming a penalty judgment of death after a second penalty trial. (App. to Pet. for Cert. at 13-89.) The opinion, filed on December 20, 1990, is reported at 52 Cal.3d 210, 801 P.2d 323, 276 Cal.Rptr. 80. An earlier opinion of the California Supreme Court had affirmed the first jury's findings of guilt (two counts of first degree murder, one count of attempted murder) and special circumstances (multiple murder), but reversed the sentence of death. *People* v. *Haskett*, 30 Cal.3d 841, 640 P.2d 776, 180 Cal.Rptr. 640 (1982).

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and to former California Penal Code sections 190.1 - 190.4, which are set forth in the Appendix of the Petition for Writ of Certiorari at 3-12.

STATEMENT OF THE CASE

A. First Trial and Appeal

Petitioner was charged on November 20, 1978 in the Los Angeles County Superior Court, with two counts of first degree murder (Pen. Code § 187) for the killings of Keith and Cameron Rose, and the rape (Pen. Code § 261), robbery (Pen. Code § 211), and attempted murder (Pen. Code § 664/187) of Gwendolyn Rose, as well as the special circumstances of murder during the commission of rape (former Pen. Code § 190.2(3) (iii) and multiple murder (former Pen. Code § 190.2(5)). The first opinion of the California Supreme Court fairly summarizes the prosecution evidence relating to guilt:

> "On October 23, 1978, defendant was arrested and charged with the rape, robbery, and attempted murder of his half-sister, Mrs. Gwendolyn Rose, and with the first degree murder of her two sons, Keith and Cameron. The key witness for the prosecution was Mrs. Rose, who testified in substance as follows.

"In the morning hours of October 23, Mrs. Rose was awakened when her 11-year-old son Keith returned home after spending the weekend with his grandmother. Her husband had already left for work, but she remained in bed, where her four-year-old son Cameron was also sleeping. Shortly after Keith's arrival, she was awakened again, this time by defendant, who had already entered the house and was apparently in the living room. He identified himself as Randy, and she recognized his voice. He asked her to help him start his car, which he claimed had a dead battery. She responded from the bedroom that she could not help him because she had no cables, but invited him to make himself at home and prepare something to eat.

"A few moments later she heard Keith shout that defendant had cut him. She rushed to the living room, where she saw defendant wielding a kitchen knife and observed blood on her son's hand. Defendant then grabbed her hand and told her not to speak or move. He put the children in the bedroom closet, then demanded that Mrs. Rose engage in sex with him. Out of fear, she agreed to capitulate to his sexual demands if he would put the knife down. He did so, but after intercourse he picked it up again and told her he needed money. Again because she was frightened, she emptied her purse on the bed and gave him the contents, alightly over $30. He handed her a pillow case or towel and told her to wipe all the surfaces in the room that he may have touched. After she had finished, he choked, kicked, and repeatedly stabbed her until she sank to the floor

motionless. He covered her with a bedspread and went to the closet. Opening the door, he coaxed the boys out, then killed them both by repeated stabbing.

"To corroborate Mrs. Rose's testimony, the prosecution offered several photographs of the corpses and of Mrs. Rose's wounds, the testimony of police officers that they discovered $30 in the pocket of a shirt lying under the covers of defendant's bed, several items of blood-stained clothing found in defendant's washing machine and elsewhere at his residence, the testimony of a sheriff's office criminalist that there was evidence of semen in Mrs. Rose's vagina shortly after the assault, and the testimony of Mrs. Rose's sister that she called the Rose residence on the morning of October 23 and spoke briefly to a man identifying himself as Randy."

"The jury returned a verdict of guilty on the murder and attempted murder charges, and found true the allegation that a knife was used in the commission of those crimes. It also found true the special circumstance of multiple murder. It was unable to agree on the rape and robbery counts, however; the verdict forms revealed that the jury was evenly divided on the robbery charge and that it split nine to three on the rape charge, with the majority favoring conviction." 30 Cal.3d at 847-849, 640 P.2d at 781, 180 Cal.Rptr. at 645.

On automatic appeal by the California Supreme Court, that court affirmed the convictions and special circumstance finding, but reversed as to penalty. *Id.* at 868.

B. Second Penalty Trial and Appeal.

Retrial of the penalty phase began on December 8, 1985, and ended on March 6, 1984, when the jury returned a verdict of death. The evidence presented to the jury comprised the evidence relating to guilt, summarized above, and evidence relating to aggravation or mitigation of sentence. The California Supreme Court summarized that evidence in its second opinion:

> "As a potential aggravating factor, the prosecution presented evidence of an alleged sexual assault and beating of Mrs. Toni R. in 1977. On the morning of October 7 Mrs. Toni R. went to the mail box a few yards from her apartment door. As she reentered, defendant, who had apparently slipped inside, pulled a sweatshirt over her head and pushed her to the floor. Defendant forced the woman into a bedroom and began to undress. Mrs. Toni R., who was eight months pregnant, became nauseous. Defendant demanded oral sex; the woman protested to all of his demands: 'I'm not having sexual relations with my husband, and eight months pregnant at this point, and I'm certainly not going to have it with you.' Defendant then grabbed Mrs. Toni R., forcibly took her to the bathroom, wet her hands, rubbed them with soap and, using her hand, massaged his penis. When defendant ordered the woman to undress, she stood up, started praying out loud, and then attempted to escape. He dragged her back by the neck, stating, 'Now I am going to kill you or your baby before I leave because you didn't do what I said.' As he jumped on her back, punching at her, she

crouched in a corner, attempting to ward off the blows to her stomach. At one point his hand passed her mouth; she bit him hard and then screamed.

"A neighbor heard the screams and called the police. Moments later Toni R.'s husband arrived home unexpectedly; he was unable to enter because the screen door had been locked by defendant. When the doorbell rang, Mrs. Toni R. screamed repeatedly that a man was trying to rape her. Defendant grabbed his pants and fled through the back door.

"Although defendant was chased by the husband and a neighbor, he eluded them and was not apprehended until later in the day when police tracked down the license number of the vehicle he entered for his escape. The vehicle was registered to Marlene Bell, defendant's girlfriend. Later, in a photographic lineup, Mrs. Toni R. identified defendant as her assailant.

"*Defense Evidence.* The defense presented alibi and character witnesses.

"Leola Nicholson, defendant's grandmother, testified that defendant was at home with her at the time of the attack on Gwendolyn and the two boys. She had raised defendant after his mother died of cirrhosis of the liver when defendant was four years old. His father had never taken any interest in the boy. The grandmother also testified that defendant had always been an obedient child, had finished the 10th grade and joined the service for a short time, and had been a good father to the 2 children of his 'wife,' Marlene Bell.

"Cora Mays, defendant's older sister, described his impoverished childhood. She also said he was a 'normal' child who never got into trouble. She testified that he got along well with children, was good to them, and was not the kind of person to commit the crimes of which he was convicted.

"Many friends and neighbors testified to defendant's good character, that he was never in trouble, and that he played with and was good to neighborhood children. Six or more relatives described defendant's kind nature and good habits -- no drinking, smoking, or drug taking -- and none believed defendant was capable of committing the crime charged. Several friends and relatives testified to seeing defendant in the neighborhood variously between 7 a.m. and 8:30 a.m. on the day of the killings. An investigator, Curtis Latimore, testified that it took 30 minutes to drive in moderate traffic from the scene of the murders to 70th Street where defense witnesses claimed to have seen defendant at approximately the time of the murders.

"It was stipulated that defendant was once a witness to a robbery, assisted police in their investigation, and testified for the prosecution at the preliminary hearing.

"Michael Lyons, trial counsel at the first trial, testified that he had thought that a psychiatric defense would be essential and, in aid of that defense, he had advised defendant to tell Dr. Stalberg, a court-appointed psychiatrist, that he had committed the crimes charged. The defense had

called Dr. Stalberg as a witness in the first penalty trial.

"On cross-examination of Lyons, the prosecution suggested that Lyons was lying about having told defendant to confess to Dr. Stalberg. And on redirect, the defense sought to establish that Lyons was an inexperienced criminal attorney at the time he represented defendant in the first trial.

"*Prosecution Rebuttal Evidence.* A police officer testified that, on the day of the killings, when he called Leola Nicholson in an effort to locate defendant, she became quite excited and asked several times, 'What has that boy done now?'

"The main rebuttal witness was Dr. Stalberg, who testified that he had been retained by the defense in the prior trial to explore possible psychiatric defenses and that, in the course of an interview, defendant admitted that he went to Gwendolyn's house, engaged in sexual activity with her, stabbed her because he was afraid she would scream, and then stabbed her sons several times. On cross-examination Dr. Stalberg testified that in 1982, at the time of the retrial, he again contacted defendant in jail but refused to participate in the case because defendant no longer admitted culpability for the crimes." 52 Cal.3d at 221-224, 801 P.2d at 327-329, 276 Cal.Rptr. at 84-86.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE TRIAL COURT PROPERLY QUESTIONED THE JUROR ABOUT ALLEGATIONS THAT HE COMMITTED MISCONDUCT DURING DELIBERATIONS

Petitioner first contends that his sentence of death is constitutionally invalid because the trial court coerced one of the jurors into voting to impose that punishment. Although respondent believes that the sentence was not the result of juror coercion, *see infra*, the People of the State of California initially feel constrained to observe that petitioner has not raised an issue which, in this factual context, is worthy of the Court's attention. For either of these reasons the Court should deny certiorari on this question.

A writ of certiorari, of course, is not a common law writ of error, which was intended to permit an appellate court to conduct a broad review of the judgment below. Rather, the exercise of the Court's certiorari jurisdiction is appropriate when: (1) a conflict exists between two (or more) United States Courts of Appeals on a federal issue of substantial importance; (2) a conflict exists between a United States Court of Appeals and a state court of last resort; (3) a conflict exists between two (or more) state courts of last resort; or (4) "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Rule 10.1(c), Rules of the Supreme Court of the United States.

Petitioner has alleged no meaningful conflict between the opinion of the California Supreme Court in this case and decisions of any other state court or United

States Court of Appeals. Rather, his argument is that the state court misapplied this Court's relevant decisions in finding that the facts of the case did not amount to coercion. Such a fact-specific federal claim does not merit review by this Court; redress should be sought elsewhere. *See* 28 U.S.C. §§ 2241 *et seq.*

Turning to the merits of the claim, we first set forth the California Supreme Court's summary of the pertinent facts:

> "On the sixth day of deliberations, the jury's requests for clarification for the first time focused on a single, allegedly recalcitrant juror. On that day the jury submitted a question: 'We have one juror who continues to use insanity or mental disturbance as a mitigating circumstance even though you, the judge, have said we can't use it. He refuses to discuss the case anymore. Is there anything you can do, being he is disregarding your ruling completely?' Following a discussion with counsel and over the objection of defense counsel, the court determined that a hearing was in order to ascertain whether the juror was in fact refusing to deliberate.
>
> "The court summoned the jurors and asked them collectively whether there was any among them who felt he or she could not or would not consider the evidence and follow the court's instructions. There was no response. The court then secured from the foreman the name of the allegedly offending juror (Roy Lizana). At this time defense counsel asked the court to determine the numerical division of the jury. The court refused to do so and excused all jurors except Mr. Lizana.

"After cautionary warnings concerning the limited nature of the examination it was conducting, the court obtained Lizana's assurance that he was not using *insanity* as a mitigating circumstance and that he was following the court's instructions in that regard. The entire colloquy follows: '[Court:] Mr. Lizana, before I ask you any questions, sir, I want to caution you. I don't want you to give me any of your thinking whatsoever. You have a right to your own private thinking. What I am obligated to go into is the subject matter of the note which indicates that you were considering something as a mitigating factor that I indicated there was no evidence of. Any of your other reasons for what you thinking is are not my concern at this time. They are your own concern. You may have a thousand reasons for any particular way you intend to vote, and those reasons may all be valid reasons. The only problem that I have to find out at this time is are you disregarding the court's instruction that was given to you that Mr. Haskett is presumed sane and that this may not be considered as a mitigating factor. That is all you have to answer. You don't have to answer me another thing. Do you understand? [Lizana:] I understand what you said. That wasn't my idea. That was the question. That was the question they sent in to you. [Court:] That is all I want to know. Then, as far as you are concerned, are you following the court's instruction on this particular point? [Lizana:] Yes, I am. [Court:] That is all I want to know. As far as I am concerned, that is sufficient. But I can only go on what I have heard. Then it's your assurance that you are not using this as a mitigating circumstance and you are following the court's instruction as far as

whatever conclusions you have come to; is that correct? [Lizana:] I figure if he was, we wouldn't be sitting inhere now. If he was judged insane, we wouldn't have had to come in. Leave it at that. [Court:] Don't tell me anymore. All I want is your assurance. That is sufficient for me.'

"Though pressed by the prosecution to ask further questions to test Lizana's credibility concerning his alleged refusal to deliberate, as to which the court had not yet questioned Lizana, the court refused, stating that her only concern was whether Lizana was unwilling or unable to follow the court's instruction: 'In any case, somehow I might consider going into a jury deliberative processes, but in this case we all are aware that any individual who is exercising mercy can hang up a jury, I am not going to go into a situation--if he were hanging up a jury because his sole reason is that he will not follow the court's instructions on a particular point, then I might go into it further. But if he has other reasons on which he is basing his disagreement, and that is what he has represented to me, . . . I would not go into deliberative processes where we have a situation in which an individual, one individual, decides to exercise mercy and question him on that.'

"Nonetheless, despite her expressed reluctance to question Lizana on his alleged refusal to deliberate, the court recalled Lizana and asked several questions: 'Mr. Lizana, relax. This is just to be sure that I understand you. Do you use insanity or mental disturbance as a mitigating circumstance?' Lizana responded, 'No, ma'am.' The court asked, 'Do you refuse to discuss the case with other jurors?' Lizana stated, 'No. I never did refused to deliberate.' And to the

question, 'Are you willing to continue deliberating?' Lizana answered, 'I am.'

"The court thereafter directed the jury to continue deliberating, and on the afternoon of the following day the jury reached its verdict of death." 52 Cal.3d at 236-237, 801 R.2d 337-338, 276 Cal.Rptr. at 94-95 (fns. omitted).

Petitioner identifies 14 factors which, in combination, resulted in a coerced verdict. (Pet. for Cert. at 11-16.) The opinion of the California Supreme Court in refuting petitioner's multifaceted argument is both comprehensive and persuasive. See 52 Cal.3d at 237-241, 801 P.2d at 338-340, 276 Cal.Rptr. at 95-97. We offer the following observations merely to illuminate what we believe to be the relevant issues.

The trial court was reliably informed that one of the jurors refused to follow the court's instructions, an act which constitutes juror misconduct under state law. *See, e.g., People v. Burgener*, 41 Cal.3d 505, 519-520, 714 P.2d 1257, 224 Cal.Rptr. 112 (1986). Due process arguably requires that the trial court immediately hold a hearing to determine whether any impropriety occurred. *Rushen v. Spain*, 464 U.S. 114, 117-118 n.2 (1983), *id.* at 126 (conc. opn.); *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

The hearing itself was not coercive. The questioning was very brief and strictly confined to the issue whether the juror could and would follow the trial court's instructions. The examination was conducted in the absence of the other jurors and their potentially coercive influence. The court did not review or comment upon the evidence. The court did not encourage the juror to reconsider his position in light of the positions taken by the other jurors. *Cf. Lowenfield v. Phelps*, 484 U.S. 231, 235, 237 (1988); *Allen v. United States*, 164 U.S. 452, 501-502 (1896). The court did not advise the juror that he

was required to reach a decision. *Cf. Jenkins v. United States*, 380 U.S. 445, 446 (1965). After the trial judge discharged its obligation to determine the juror's fitness to serve, she terminated the hearing. The focus was on the juror only to the extent necessary to determine whether he could remain on the jury. There was no coercion.

II.

THE INSTRUCTIONS TO THE JURY ADEQUATELY ADVISED THEM THAT THEY COULD CONSIDER EVIDENCE OF INSANITY AS A FACTOR IN MITIGATION OF PUNISHMENT.

Petitioner's second question is whether the trial court violated the Eighth Amendment by instructing the jury that petitioner was presumed sane. Petitioner argues that this instruction foreclosed the jury from considering evidence of insanity as a mitigating factor. Petitioner's entire argument founders on the shoals of a finding by the California Supreme Court that any evidence of insanity could have been considered in mitigation of penalty in connection with the trial court's instructions on mental disturbance or extenuating circumstances. Because the jury was not foreclosed from considering the mitigating evidence identified by petitioner, his rights under the Eighth Amendment were not violated.

We first set forth the relevant instructions which the trial court delivered to the jury:

> "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part

of the trial of this case except as you may hereafter be instructed." (RT 6188)

"You shall consider, take into account and be guided by the following factors, if applicable:

"(A) The circumstances of the crime in which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true."

. . . .

"(D) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."

. . . .

"(H) Whether or not, at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was impaired as a result of mental disease or defect or the effects of intoxication."

. . . .

"(K) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any other aspect of the defendant's character or record that the defendant offers as a basis for sentence less than death." (RT 6189-6190).

. . . .

"You may consider pity, sympathy and mercy in deciding the

appropriate penalty. However, you must not be governed by mere conjecture, prejudice, or public opinion. (RT 6191)

. . . .

"You may consider as a mitigating factor any possible doubt as to the defendant's guilt. A possible doubt may arise after a consideration of all the facts and evidence you may have heard." (RT 6191)

On the third day of deliberations, the court received and responded to a question from the jury as follows:

"Question Number Three: 'Do we have to have expert testimony as to mental or emotional disturbance?' [Answer:] 'Mental or emotional disturbance is not always necessarily proved by the testimony of an expert such as a psychiatrist. It may be proved by any other testimonial evidence but not by speculation.'" 52 Cal.3d at 225, 801 P.2d at 329, 276 Cal.Rptr. at 86.

On the afternoon of the fifth day of deliberations the jury asked "whether we could consider insanity based on the fact of repeated stabbings of the victim." The court answered: "The defendant is presumed to be sane. The jurors cannot consider insanity as a mitigating factor." 52 Cal.3d at 227, 801 P.2d at 331, 276 Cal.Rptr. at 88.

The State of California and its Supreme Court agree that petitioner was constitutionally entitled to have his jury consider as a mitigating factor any aspect of his character or record and any of the circumstances of the offense that he proffered as a basis for a sentence less than death. *Id.* at 228, 801 P.2d at 331, 276 Cal.Rptr. at 88;

Skipper v. *South Carolina*, 476 U.S. 1, 4 (1985); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lockett* v. *Ohio*, 438 U.S. 586 (1978). Seizing upon the State Supreme Court's acknowledgement that the trial court's instruction precluded the jury from considering insanity as a mitigating factor (52 Cal.3d at 231 n. 7, 801 P.2d at 334 n. 7, 276 Cal.Rptr. at 91 n. 7), petitioner argues that his rights under the Eighth Amendment were violated. We disagree.

The Eighth Amendment does not entitle a capital defendant to consideration by the finder of fact of mitigating evidence under some specific, necessarily limiting, rubric such as "insanity". Rather, the Constitution guarantees only that relevant beneficial evidence, in fact, will be admitted and evaluated; there is no additional entitlement to the use of an arbitrary, and perhaps meaningless, label. Even if the jury did not consider the question of petitioner's sanity, the trial court at no time indicated that mental disturbance could not be considered as a mitigating circumstance. 52 Cal.3d at 233 n. 9, 801 P.2d at 335 n. 9, 276 Cal.Rptr. at 92 n. 9. Because, as the State Supreme Court found, the method of infliction of death could have been viewed as evidence in mitigation under the instructions regarding mental disturbance or extenuating circumstances (52 Cal.3d at 232-235, 801 P.2d at 333-337, 276 Cal.Rptr. at 90-94), the jury was not foreclosed from considering evidence helpful to petitioner.

Blystone v. *Pennsylvania*, ___ U.S. ___, 108 L.Ed.2d 255 (1990), supports our position. The defendant there argued, *inter alia*, that the trial court's instruction to consider whether he was affected by "extreme" mental or emotional disturbance "impermissibly precluded the jury's consideration of lesser degrees of disturbance,

impairment, or duress." (*Id.* at p. 265.) The Court rejected this argument, emphasizing that the jury was also told that it was entitled to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." (*Ibid.*) The Court held that the instruction "fully complied with the requirements of" *Lockett* v. *Ohio* (1978) 438 U.S. 586; and *Penry* v. *Lynaugh* (1989) 492 U.S. ____ 106 L.Ed.2d 256. (*Blystone*, at p. 265.)

Blystone stands for the sensible proposition that the Constitution guarantees that constitutionally relevant evidence will be considered by the finder of fact in determining appropriate sentence; it makes no promise, because it need not, that the evidence will be placed into some predetermined, perhaps inappropriate, pigeonhole.

In light of the State Supreme Court's finding, not challenged here, that the jury did consider evidence bearing on the issue of mental disturbance, petitioner's argument poses no substantial federal question.

III.

PETITIONER'S CLAIM OF PROSECUTORIAL MISCONDUCT RAISES NO SUBSTANTIAL FEDERAL QUESTION

Petitioner's third claim is that the prosecutor engaged in several acts of misconduct which, taken as a whole, violated his rights under the Eighth Amendment. This claim raises no substantial federal question for the following reasons:

First, virtually all of claimed acts of misconduct prompted no objection at trial. Under state law, appellate challenge was precluded for that reason. 52 Cal.3d at

244; 801 P.2d at 343, 276 Cal.Rptr. at 100; *People* v. *Green*, 27 Cal.3d 1, 27, 609 P.2d 468, 164 Cal.Rptr. 1, 609 (1980). "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. [Citations omitted.] This rule applies whether the state law ground is substantive or procedural." *Coleman* v. *Thompson*, __ U.S. __, 59 U.S.L.W. 4789, 4791 (1991). The failure to object contemporaneously is an adequate basis for the refusal to consider the merits of a federal claim. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). The state court's invocation of that principle was sufficiently clear to preclude federal review. *See, Michigan* v. *Long*, 463 U.S. 1032, 1037-1044 (1983); *cf. Harris* v. *Reed*, 489 U.S. 255, 264 & n. 10 (1989).

Turning to the merits of petitioner's issue, we have grave doubts that it poses a federal question, substantial or otherwise. Prosecutorial misconduct does not offend due process unless it "infect[s] the trial with unfairness." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974). For the reasons comprehensively set forth in the state court's opinion (52 Cal.3d at 244-248, 801 P.2d at 343-345, 276 Cal.Rptr. at 100-102), the specifications of misconduct, either singly or in conjunction, do not remotely reach that level.

IV.

PETITIONER MAY NOT COMPLAIN ABOUT THE INTRODUCTION INTO EVIDENCE OF A STATEMENT TO WHICH HE MADE NO OBJECTION AT THE FIRST TRIAL AND WHICH HAD NOT BEEN ELICITED IN VIOLATION OF ANY CONSTITUTIONAL RIGHTS

Petitioner's final claim is that it was federal constitutional error to permit the prosecution to admit evidence of a confession which petitioner made to a psychiatrist appointed on his behalf prior to the first trial. The record, fully reviewed by the California Supreme Court in its opinion, refutes petitioner's contention.

The prosecution called Dr. John Stalberg as a rebuttal witness over petitioner's objection. Dr. Stalberg had been appointed at petitioner's request before the first trial and had been called by the defense at the penalty phase of that trial. Dr. Stalberg testified that petitioner was mildly retarded and capable of rehabilitation. On cross-examination, he stated that petitioner suffered from a compulsive sexual disorder and that petitioner admitted responsibility for the deaths of the children and the attack upon their mother. At the second penalty trial, Dr. Stalberg was called by the prosecution as a rebuttal witness and repeated petitioner's admissions. 52 Cal.3d at 241-242, 801 P.2d at 341, 276 Cal.Rptr. at 98.

It is indisputable that Dr. Stalberg violated no constitutional principle when he elicited the confession prior to the first trial. Because the interview was held at the request of petitioner's counsel, there was no violation of the Sixth Amendment. *Cf. Estelle* v. *Smith*, 451 U.S. 454 (1980). For the same reason, there was no custodial interrogation, and thus no coercion, within the meaning of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Petitioner reasonably believed that he was speaking to a member of the defense team, not to a law enforcement officer. *Cf. Illinois* v. *Perkins*, ___ U.S. ___, 110 S.Ct. 2394 (1990). Due process concerns were not implicated because an interview between an accused and his defense psychiatrist simply cannot be considered state action. *Colorado* v. *Connelly*, 479 U.S. 157 (1986).

Turning next to the elicitation of petitioner's confession from Dr. Stalberg at the first trial, we note that it could not have occurred if petitioner had not called him to the stand at that trial. Cal. Evid. Code § 1010, *et seq.* Once Dr. Stalberg testified, he was subject to appropriate cross-examination (*cf. United States* v. *Havens*, 446 U.S. 620 [1980]), to which petitioner made no objection. 52 Cal.3d at 243, 801 P.2d at 341-342, 276 Cal.Rptr. at 98-99.

Since the statement was lawfully elicited at the first trial, no constitutional principle precluded its introduction at the second trial. *Cf. Harrison* v. *United States*, 392 U.S. 219 (1968).

CONCLUSION

For the reasons stated above, respondent respectfully submits that the petition for writ of certiorari should be denied.

DATED: July 18, 1991

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CERTIFICATE OF SERVICE BY MAIL

RANDY HASKETT,	)	No. 90-1951
	)	
Petitioner,	)	
	)	
v.	)	
	)	
STATE OF CALIFORNIA,	)	
	)	
Respondent.	)	
	)	

RONALD E. NIVER, a member of the Bar of the Supreme Court Of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 6200, in the City and County of San Francisco, State of California; that on July 18, 1991, he served a true copy of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on petitioner by placing same in envelope addressed as follows:

William J. Kopeny
Attorney at Law
2677 North Main Street, Suite 100
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Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

RONALD E. NIVER
Deputy Attorney General